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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 279

MAGNOLIA PETROLEUM COMPANY, *Petitioner*

v.

CITIES SERVICE GAS COMPANY, a corporation; and FEDERAL POWER COMMISSION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

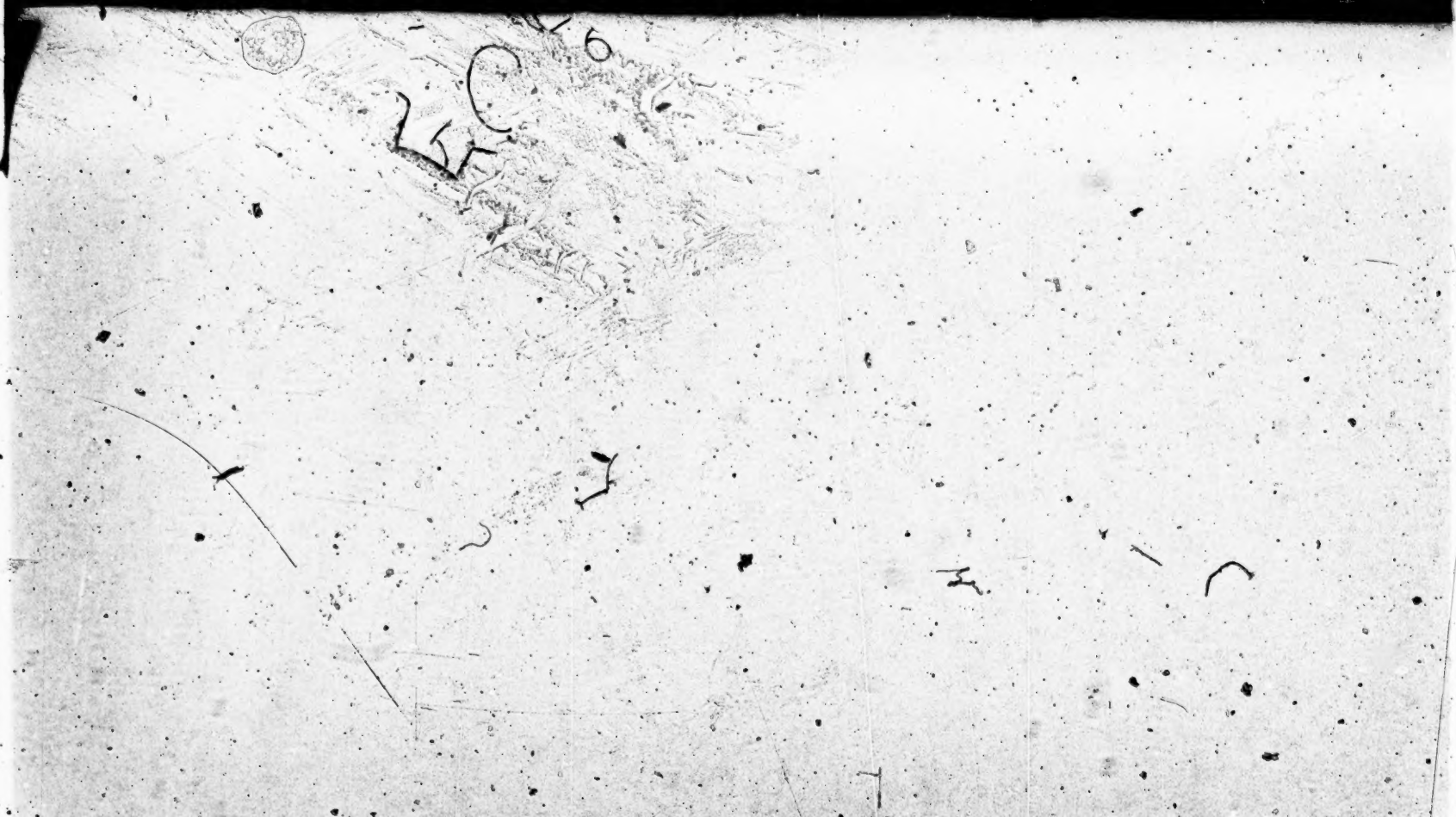
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OPINION BELOW

The orders of the Federal Power Commission (R. 186-188, 200-201; Pet. App. B, 41-45) are not reported. The opinion of the Court of Appeals (Pet. App. A, 29-40) is reported at 255 F. 2d 860.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1958 (Pet. App. F, 61). A petition for rehearing, timely filed (Trans. 130) was finally denied on July 15, 1958 (Supp. Trans. 2). The petition for a writ of certiorari was filed on August 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether orders of the Federal Power Commission, accepting, under Section 4(e) of the Natural Gas Act, the 11-cent minimum price order issued by the Kansas Corporation Commission (held invalid in *Cities Service Gas Co.* v. *Kansas Corporation Commission*, 355 U.S. 391), rather than the 6-cent price established in the contract between the parties as the effective rate as of June 7, 1954 for the sales of gas by Magnolia Petroleum Company to Cities Service Gas Company, constitute reviewable orders within the meaning of Section 19(b) of the Act.

2. Whether the Court of Appeals properly directed that the invalid minimum price order of the Kansas Corporation Commission be stricken from Magnolia's rate filing with the Federal Power Commission.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717 *et seq.*, are set out in Petitioner's Appendix E, pp. 53-56, 57-60.

STATEMENT

1. *Background.* (a) *The Magnolia Contract.* Cities Service Gas Company[1] is a natural-gas company en-

[1] Hereinafter referred to as "Gas Company."

gaged in the business of transporting and selling natural gas in interstate commerce at wholesale for resale and directly to industrial consumers in Oklahoma, Kansas, Nebraska and Missouri. On June 17, 1946, the Gas Company contracted to purchase from Magnolia Petroleum Company,[2] an independent producer, gas produced from approximately 100,000 acres of leaseholds in the Hugoton Field in Kansas (R. 19-41). The contract provides, *inter alia*, for a price of six cents per Mcf, measured on a pressure base of 16.4 pounds, for 15 years from the date of first delivery on December 13, 1948 (R. 26), and thereafter at a price to be agreed upon by the parties, or to be fixed by arbitration upon their inability to agree (R. 26). The contract was to be in effect for 20 years and, so long thereafter as gas is produced in commercial quantities (R. 38).

(b) *The Kansas Minimum Price Order and its Invalidation.* On December 2, 1953, the Kansas Corporation Commission, purporting to act in aid of its gas conservation powers, issued an order, effective January 1, 1954, prescribing a minimum price of 11 cents per Mcf, measured on a pressure base of 14.65 pounds, for all gas taken from the Kansas-Hugoton Field (R. 118-124). The Gas Company, prior to its issuance, had protested the order and, immediately after its issuance, brought suit in the District Court of Finney County, Kansas, to review and set aside the order. That court rejected the Gas Company's claim that the order sought to fix a price for gas sold for resale in interstate commerce in conflict with Section 1(b) of the Natural Gas Act, and upheld the order. On the Gas Company's appeal, the Kansas Supreme Court

[2] Hereinafter referred to as "Magnolia."

similarly held that the state minimum price order came within the excluding provisions of Section 1(b) and that the state order was, therefore, valid (*Cities Service Gas Co. v. Kansas Corp. Comm.*, 180 Kan. 454, 304 P. 2d 528). On January 18, 1957, the Gas Company appealed to this Court and on January 20, 1958, this Court reversed the judgment of the Kansas Supreme Court (355 U.S. 391).

(c) *Conditional Payments to Magnolia and the Gas Company's Declaratory Judgment Action.* Prior to making any payments to Magnolia for gas delivered after the effective date (January 1, 1954) of the Kansas order, the Gas Company advised Magnolia, by letter dated January 21, 1954, that it was contesting the validity of the order and that pending final determination thereof and in order to avoid statutory penalties, it would pay for all gas purchased by it from the Kansas-Hugoton field in compliance with that order, such payments, however, to be considered and accepted by Magnolia as involuntary and without prejudice to the Gas Company's rights in the pending litigation. The letter further advised that in the event the Kansas order was finally determined to be invalid, the Gas Company expected Magnolia to refund all overpayments (R. 131-132). Each monthly check issued to Magnolia thereafter until July 22, 1955 bore the endorsement that the payment was made subject to the conditions of the January 21, 1954 letter (R. 86). Magnolia cashed each of these checks without any reservations.

Subsequently, however, the parties disagreed as to the impact on the Kansas order of the invalidation of the Oklahoma minimum price order in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (April 11,

1955) and Magnolia threatened to regard the contract as breached unless the Gas Company paid the 11-cent price fixed by the Kansas order. Accordingly, the Gas Company, on November 30, 1955, instituted an action against Magnolia in the United States District Court for the District of Kansas, seeking declaratory judgment that the Kansas minimum price order was void and praying for judgment against Magnolia for the overpayments made under the compulsion thereof (R. 153-168, 176). As ordered by the District Court, the Gas Company has, since that time, paid into court the moneys representing payments for gas received from Magnolia since July 23, 1955 at the 11-cent state ordered price. By agreement of the parties the court also directed the payment over to Magnolia of the six-cent contract price and the impounding of the difference in the registry of the court.

2. *Commission Proceedings.* Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, on June 7, 1954, the Federal Power Commission,[3] on July 16, 1954, issued its Order 174. As amended by Order 174-A on August 6, 1954, and by Order 174-B on December 17, 1954, this Order, among other things, required each "independent producer" of natural gas to file with the Commission its rate schedules "effective on June 7, 1954."[4] Having been unsuccessful in its challenge to the validity of these orders (see *Magnolia Petroleum Co.* v. *FPC*, 235 F. 2d

[3] Hereinafter referred to as "Commission."

[4] The orders define rate schedule as "the basic contract and all supplements or agreements amendatory thereof effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges * * *." 18 C.F.R. 154.92-93.

785 (5th Cir., 1956), *cert. den.*, 352 U.S. 968 (1957). Magnolia, on January 19, 1957, tendered to the Commission for filing as a rate schedule a copy of the Kansas minimum price order together with its contract with the Gas Company (R. 118-124). In accordance with the Gas Company's protest (R. 141-148), *inter alia*, that the aforementioned January 21, 1954 letter had been improperly omitted from Magnolia's filing, the Commission, on February 15, 1957, rejected the filing without prejudice to its re-tender if copies of the January 21, 1954 letters were added, or alternatively, if the Kansas price order were eliminated from the filing (R. 176-177).

Magnolia re-tendered its proposed filing, together with a copy of the letter of January 21, 1954, on February 19, 1957 (R. 177-178). The Gas Company again protested its acceptance on the grounds, also urged in its protest to the original filing (R. 141-148), that the Kansas minimum price order was void *ab initio*, and consequently, since it could not change the six cent contract price, it was not properly a part of Magnolia's effective price on June 7, 1954 (R. 179-185). The Gas Company also urged that if the Commission did accept the re-tendered filing, it should expressly be made conditional and without prejudice to the Gas Company's rights against Magnolia in the pending court litigation (R. 185). By order issued March 31, 1957, the Commission accepted Magnolia's re-tendered filing "* * * subject, however, to the express condition that such acceptance is without prejudice to any claims or contentions which have been made by or for Magnolia Petroleum Company or by or for Cities Service Gas Company in pending litigation concerning this particular sale of gas." (R. 186-188).

On March 25, 1957, Magnolia wired the Gas Company (R. 198):

> "THIS IS TO ADVISE YOU THAT THE FPC HAS ACCEPTED AS MAGNOLIA'S EFFECTIVE RATE ITS RATE FILING OF 11c PER MCF. THIS IS A DEMAND UPON YOU TO MAKE PAYMENT AT THIS EFFECTIVE FILED RATE DIRECT TO MAGNOLIA PETROLEUM COMPANY. NO FURTHER DEPOSITS ARE TO BE MADE IN THE FEDERAL COURT AT WICHITA, KANSAS. ALL PAYMENTS INTO THE REGISTRY OF THE COURT TO DATE SHOULD NOW BE TURNED OVER TO MAGNOLIA PETROLEUM COMPANY."

Since the Gas Company construed the Commission's March 21, 1957 order as meaning that if the Kansas minimum price order is held invalid, Magnolia's legally effective rate is the six-cent contract price, otherwise, the 11-cent Kansas minimum price, the Gas Company rejected Magnolia's demand (R. 199-200), and applied to the Commission for rehearing and clarification (R. 188-195). Magnolia likewise filed an application for rehearing and clarification (R. 195-198). By order issued May 17, 1957, the Commission eliminated the "without prejudice" provision from its March 21 order (R. 200-201).[5]

3. *The Decision of the Court of Appeals.* On the Gas Company's petition for review, the Court of Appeals set aside the Commission's order accepting the

[5] Considering the May 17 order as in effect a new order, the Gas Company filed an Application for Rehearing. The Commission, however, rejected this Application for the stated reason that "There is no provision under the Natural Gas Act nor in the Commission's rules for applications for rehearing of orders denying rehearing" (R. 11). This Application for Rehearing also reiterated the various objections previously raised in the Gas Company's protest.

11-cent rate and remanded the case to the Commission with directions to strike the Kansas minimum price order from Magnolia's filing (Pet. App. A, 39).[6] In so concluding, the court below, relying on its earlier decision in *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470 (1955), *cert. den.*, 350 U.S. 1005 (1956), held that the Commission's order was reviewable, since it purported to establish with finality the rate which Magnolia was authorized to charge the Gas Company on June 7, 1954 (Pet. App. A, 33-35). On the merits, the Court of Appeals, quoting at length from *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U.S. 332 (1956), to the effect that the Act does not grant to a party to a contract the right unilaterally to change the contract rate, ruled that although the Kansas order, if valid, would have been effective to alter Magnolia's contract with the Gas Company, "[w]hen the United States Supreme Court struck down the Kansas order, there was no longer a valid order which could modify the contract rate, and the contract rate was the rate effective on June 7, 1954" (Pet. App. A, 38).

ARGUMENT

I. THE COMMISSION'S ACCEPTANCE OF MAGNOLIA'S FILING IS REVIEWABLE

The Court of Appeals properly, we submit, held that the Commission's orders accepting Magnolia's rate filing constitute reviewable orders within the meaning of Section 19(b) of the Natural Gas Act. Contrary to Magnolia's contention (Pet. pp. 9-11), this ruling does not conflict with *Lee* v. *FPC*, 236 F. 2d 835 (5th

[6] The emphasis appearing in this language as it is set out in the Appendix to the petition, apparently has been supplied by Magnolia. It does not appear in the original opinion as issued by the court below.

Cir., 1956), *cert. den.*, 352 U.S. 970 (1957), or with *Shank* v. *FPC*, 236 F. 2d 830 (5th Cir., 1956), *cert. den.*, 352 U.S. 970 (1957).

A. The criteria for ascertaining the renewability of administrative orders are well established. "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequence to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 425 (1942).[7] "Thus, administrative orders are ordinarily reviewable when 'they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.' Under this test a final order need not necessarily be the very last order." *Isbrandtsen* v. *United States*, 211 F. 2d 51, 55 (C.A.D.C., 1954), *cert. den.*, 347 U.S. 990 (1954) and cases there cited.[8] As summarized by the court below in its earlier decision in *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470, 474-475 (1955), *cert. den.*, 350 U.S. 1005 (1956):

> "* * * reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review."

[7] See, also, *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[8] See, also, *Atlantic Seaboard Corp.* v. *FPC*, 201 F. 2d 568, 572 (4th Cir., 1953); *Algonquin Gas Transmission Co.* v. *FPC*, 201 F. 2d 334, (1st Cir., 1953); *cf. Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110 (1948).

The Commission's orders here are clearly reviewable under these standards, for, far from being merely procedural steps taken at the inception of an administrative process, as claimed by Magnolia (Pet., p. 8), the orders here involved are final orders accepting for filing a tendered rate schedule which is to remain in effect until changed in an entirely new and separate proceeding. Those orders not only purport to fix the rate (at about double the contract price) which the Gas Company is to pay Magnolia for an indefinite period into the future, but also operate to make this rate retroactive to June 7, 1954. Thus, the orders adjudicate with finality "an effective rate at June 7, 1954." So far as this particular administrative proceeding is concerned, there are no issues left to be decided, no further hearings to be had and no further orders to be made. In a word, the administrative processes are at an end.[9]

Moreover, contrary to its claims here, Magnolia itself has recognized and treated these orders as final. It was on the basis of these orders that Magnolia demanded of the Gas Company that it "make payments at this effective filed rate direct to Magnolia Petroleum Company. No further deposits are to be made in the Federal Court at Wichita. All payments into the Registry of the Court to date should now be turned over to Magnolia." (R. 198). And when the Gas Company declined to yield to this demand, Magnolia

[9] The dollar impact of these orders is indicated by the billing statement which Magnolia submitted as part of its filing (R. 133-139). This statement shows that for the single gas billing month May 23 through June 22, 1954, Magnolia delivered 1,040,315 Mcf of gas (14.65 psia). The difference between the 11-cent price accepted by the Commission and the 6-cent contract price on this volume of gas for this one month is $59,249.29.

sought summary judgment in the declaratory judgment action pending in the federal District Court (Trans. 74). It there contended that the Commission's orders established 11 cents as Magnolia's effective rate on and after June 7, 1954, and hence that Magnolia is entitled as a matter of law to the moneys representing the excess over the 6-cent rate, which had been deposited in the registry of the court. These actions leave no doubt that Magnolia also is fully alert to the finality and legal consequences attaching to these orders of the Commission.

B. The holding below does not conflict with the *Lee* and *Shank* cases. The Fifth Circuit's rulings, that the Commission's orders there involved were not reviewable, were based on the wholly different facts of these cases, not on a different view of the applicable legal standards. Both of these cases involved situations where independent producers had sought to withdraw, prior to any Commission action thereon, certificate applications and initial rate schedules for sales made by them on June 7, 1954, in order to discontinue those sales and thereby enable them to sell the gas to another company at a higher price.

Since the discontinuance of the original sales constituted abandonment of service, which, under Section 7(b) of the Natural Gas Act,[10] was permissible only

[10] Section 7(b) provides:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

with Commission approval given after hearing and requisite findings, the Commission refused to permit these attempted withdrawals without the required hearings. Before the Commission could hold these hearings, the producers filed petitions for review. It was in these circumstances that the Fifth Circuit held (236 F. 2d at 834):

> "* * * we think it plain that these orders are in no proper sense definitive as contemplated by Section 19(b), but they are instead mere procedural steps taken at the inception of and not upon the completion of the administrative process. All that the Commission did in the exercise of its regulatory jurisdiction was to enter preliminary, interlocutory orders which do not bear upon the merits of the controverted fundamental issues which must ultimately be adjudicated by the Commission."

These basic differences of fact fully justified the different results without thereby creating a conflict in decisions.

II. THE KANSAS MINIMUM PRICE ORDER WAS PROPERLY STRICKEN FROM MAGNOLIA'S RATE FILING

In urging that the court below improperly directed the striking of the Kansas minimum price order from its rate filing, Magnolia claims primarily that the Kansas order was not void *ab initio*, but rather was inoperative only from July 16, 1954, when the Commission first undertook to exercise its jurisdiction over independent producers. Consequently, argues Magnolia, the order was a valid part of Magnolia's effective rate as of June 7, 1954, the critical date under the Commission's 174 series of orders. (Pet., pp. 16-26). Not only is the conclusion of the court below fully supported by *Cities Service Gas Co.* v. *Kansas Corporation*

Commission, 355 U.S. 391 (1958), but this Court already has twice declined to review this contention by denying *certiorari* in *Dorchester Corp.* v. *Natural Gas Pipeline Co.*, 357 U.S. 927 (1958), and in *Harrington* v. *Natural Gas Pipeline Co.*, 356 U.S. 957 (1958).

Magnolia's subsidiary contentions are equally without substance. Magnolia's assertion that the decision below will cause the Commission's established regulatory procedures to crumble (Pet., p. 16) apparently does not reflect the Commission's views. The Commission has not sought *certiorari*. The Commission apparently is adhering to its position in the court below where it conceded in its brief (at pp. 6-7):

> "* * * although the Magnolia rate was 'effective' at the time it was filed because it then was the only legal rate governing the sale, it must now be recognized that the actual rate and the legal rate during the period was the 6c contract rate. This follows not only from the fact that the sale contract embodied the Kansas order only if it was valid (R. 39) and the contract rate governs unless modified by the parties, but more importantly because the order in contemplation of law was a nullity and hence the only rate which could have been in effect during this period was the rate provided by the contract which was incorporated in Magnolia's rate schedule."

See also, Brief for the Federal Power Commission before the court below (No. 5666), at pp. 7, 9, 11.

A. This Court plainly ruled in the *Cities Service* case, *supra*, that the Kansas minimum price order was invalid from its inception. While the *per curiam* opinion merely states that the judgment of the Kansas Supreme Court is reversed, the opinion cites, as authority therefor, *Phillips Petroleum Co.* v. *Wisconsin*, 347

U.S. 672 (1954) and *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44 (1955). *Phillips* involved purely a question as to the scope of the Natural Gas Act, *i.e.*, its applicability to sales by independent gas producers. There was no question as to Commission exercise of jurisdiction and, indeed, the Commission had until then regarded itself as without jurisdiction. The Court's reliance upon *Phillips* in these circumstances strongly indicates that it held the Kansas order invalid because the Congressional enactment of the Gas Act had fully pre-empted the field and left no area for state action. Since the principle upholding the validity of state action where "federal power has been delegated but lies dormant and unexercised," invoked by Magnolia (Pet., pp. 19-22), ultimately depends upon Congressional intent, it, accordingly, is inapplicable here. See *Guss* v. *Utah L.R.B.*, 353 U.S. 1, 9-10 (1957), and cases there cited.

The citation of *Panoma* makes this pre-emption even more clear. There, this Court had also held invalid a state (Oklahoma) minimum price order on the authority of *Phillips*. In addition, the *per curiam* opinion in that case noted:

> "Mr. Justice Douglas, being of the opinion that state regulation is permissible until Federal price regulation permitted by *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, is imposed, dissents."

By thus dissenting, Mr. Justice Douglas makes it clear that the Court had considered and rejected limited pre-emption such as Magnolia urges here and had concluded instead that the Oklahoma order was invalid from its inception. In these circumstances, the citation of *Panoma* in *Cities Service* could only mean that the Kansas order was similarly void *ab initio*.

The Courts of Appeals which have considered the matter have construed *Panoma* as so holding. In *Natural Gas Pipeline Co.* v. *FPC, Dorchester Corp.*, 253 F. 2d 3 (1958), the Commission, as here, had accepted the Oklahoma price order (invalidated in *Panoma*) as part of a producer's effective rate as of June 7, 1954. The Third Circuit, as the court below did here, set aside the Commission's action, stating (253 F. 2d at 7):

> "* * * When the United States Supreme Court found Oklahoma's action to have been unlawful and set the state commission's order aside, there was no longer even the semblance of a valid law, or lawful order which could modify the contract rate. The contract rate, therefore, under the mandate of the Supreme Court must be held to have been the rate effective on June 7, 1954."

And the Third Circuit, "after due consideration," denied the producer's petition for rehearing based explicitly on the ground that *Panoma* had invalidated the Oklahoma order only from July 16, 1954 when the Commission issued Order 174.[11]

Likewise, in *Natural Gas Pipeline Co.* v. *Harrington*, 246 F. 2d 915 (1957), the Fifth Circuit, in affirming

[11] Dorchester's petition for rehearing asserted (at p. 4):

> "This court evidently assumed that the Oklahoma minimum price order was void *ab initio*. The Supreme Court, however, did not say when the Oklahoma minimum price order became invalid. This point was not decided by the Supreme Court in *Natural Gas Pipeline Co. of America* v. *Panoma Corporation*. In *Panoma* the court made no determination as to whether such state regulation was valid or invalid prior to the implementation of the regulation of the independent producers by the Federal Power Commission, which did not occur until promulgation by the Commission of Order 174 on July 16, 1954."

the District Court's grant of restitution of the excess over the contract rate paid under compulsion of the Oklahoma minimum price order, ruled that the invalidity of that order "was not caused by any defect or imperfection of form or slip of procedure but resulted from a total lack of jurisdiction," 246 F. 2d at page 918. When the producer's second petition for rehearing claimed that the Oklahoma order was valid until the Commission promulgated Order 174, the Fifth Circuit, in a supplemental opinion (253 F. 2d 231), rejected the contention, citing, among others, *Panoma* and *Cities Service*.

Petitions for certiorari pressing the producers' reading of *Panoma*, substantially in *haec verba* with Magnolia's claim here, were filed in both *Harrington* and *Dorchester* (see Petition in No. 901, Oct. Term, 1957, at pp. 2-3, 7-12; Petition in No. 1003, Oct. Term, 1957, at pp. 2, 9-15) and this Court denied *certiorari*, 356 U.S. 957 (1958), 357 U.S. 926 (1958).

Finally, it is to be noted that when the mandate of this Court in the *Cities Service* case (355 U.S. 391) reached the District Court of Finney County, Kansas (the trial court in that case), that court, by Journal Entry, dated May 5, 1958, found that the State Corporation Commission of Kansas "was without jurisdiction" to enter the minimum price order and ordered that "the same is hereby set aside" (See Appendix, *infra*, pp. 21-23).[12]

B. Magnolia's additional contentions do not in any way impair the soundness of the judgment of the court below.

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[12] The Kansas Commission has appealed the judgment represented by the Journal Entry to the Kansas Supreme Court on the principal ground that the minimum price order should have been set aside only from and after July 16, 1954.

1. The arguments, that the decision below is in derogation of vested rights (Pet., pp. 23-24), and further, that it deprives Magnolia of its opportunity to support the filing on the basis of voluntary payment, acquiescence or estoppel (Pet., pp. 11-14, see also, pp. 14-16), ignore the critical facts that from the time the Kansas order was first issued, the Gas Company had taken all appropriate steps looking toward the order's invalidation and had made known its intention on numerous occasions to insist upon its contract rights when its position was vindicated.

Thus; the Gas Company sought judicial review of the Kansas order and brought the case to this Court. *Supra*, pp. 3-4. In addition, on January 21, 1954, shortly after the Kansas order was issued and before any further payments were due under the contract, the Gas Company advised Magnolia that while it would pay at the 11-cent rate, these payments were involuntary and without acquiescence in the order's validity and that it expected refunds of the excess when the order was finally invalidated. Each payment thereafter made was expressly subject to this letter. *Supra*, pp. 4. Also, in 1953 the Gas Company brought its action in the Kansas Federal District Court seeking a declaratory judgment that the Kansas order was invalid and judgment for overpayments made under compulsion of that order. Since that time Magnolia has received payment only at the 6-cent contract rate, the excess over that amount paid by the Gas Company being retained in the registry of that court to be disbursed in accordance with the final decision in that proceeding. *Supra*, pp. 5. Finally, when Magnolia tendered its rate filing to the Commission, the Gas Company opposed the filing on the basis of the invalidity of the

order, and instituted the present review proceeding upon the Commission's acceptance of the filing as retendered by Magnolia. These various actions by the Gas Company plainly precluded Magnolia from acquiring any vested rights in the 11-cent rate and effectively destroyed any possible basis for a claim to that rate by Magnolia on the grounds of voluntary payment, acquiescence or estoppel. And even assuming *arguendo* that such grounds can be asserted against a regulated company, the fact is that at no time did Magnolia assert such grounds in justification of the 11-cent rate. Their injection at this point, we submit, borders on the frivolous, particularly in view of the recognition in their main brief to the court below (p. 24) that "Cities Service was making payment under protest, * * *."

2. The contention that the judgment below is improperly based upon events occurring after the Commission issued its order (Pet., pp. 6, 7, 8), is based on a wholly erroneous premise. Since the basic issue raised by the Gas Company was the invalidity of the Kansas order, the alleged supervening event, *i.e.*, this Court's decision holding the Kansas order invalid, operated to settle the law for all purposes, including this proceeding.

3. Finally, the claim that the decision below conflicts with the filed rate doctrine (Pet., pp. 24-26), misconceives that principle. There is nothing in that doctrine which bars a timely attack upon the propriety of a rate filing made, as it was here, in the very proceeding in which the Commission is considering its acceptance. Moreover, Magnolia would accord the mere act of filing an unassailable sanctity. This, obviously, is not the legal fact. Rates specifically agreed upon by contract, as here, cannot be unilaterally changed. *United Gas*

Pipe Line Co. v. Mobile Gas Service Corporation, 350 U.S. 332 (1956). Nor are the *Montana-Dakota* and other cases cited by Magnolia (Pet., pp. 25-26) in point. Simply stated, Magnolia, in the instant case, attempted to obtain a price for its gas almost twice that agreed upon by contract. It relied on a void state minimum price order as a vehicle to accomplish that objective. Its "right" to the 11-cent rate is no better than the vehicle by which it sought to obtain such rate. When this Court declared the Kansas minimum price order void, Magnolia's asserted "right" vanished. Indeed, Magnolia's arguments all have a hollow ring when viewed in the light of the aforementioned letter of January 21, 1954.

CONCLUSION

The judgment of the Court of Appeals is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari, accordingly, should be denied.

Respectfully submitted,

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September , 1958.

APPENDIX

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS

No. 9934

CITIES SERVICE GAS COMPANY, a Corporation, *Plaintiff*,

vs.

STATE CORPORATION COMMISSION OF KANSAS, MARION BEATTY, CHAIRMAN, RICHARD C. BYRD and HARRY G. WILES, AS MEMBERS OF SAID COMMISSION, AND THEIR RESPECTIVE SUCCESSORS IN OFFICE,

Defendants.

Journal Entry

Now on this 5th day of May, 1958, the above entitled cause came on for hearing on the several motions of Plaintiff and Defendants, relative to the judgment to be entered by this Court pursuant to the Mandate of the Supreme Court of the State of Kansas and the Mandate of the United States Supreme Court heretofore issued in the above entitled cause. The Plaintiff appeared by its counsel O. R. Stites, Joe Rolston, M. F. Cosgrove, Mark H. Adams and D. B. Lang. The Defendants appeared by their counsel Clyde Milligan, Wayne Coulson and Dale M. Stucky.

Thereupon, counsel for Plaintiff and Defendants, having filed their respective briefs with the Court, orally argued the matter to the Court, and the Court after having heard said arguments, took the matter under advisement.

Now on this 12th day of May, 1958, the above entitled matter comes on for decision, and the Court having considered the briefs of counsel for the respective

parties and the oral arguments, and being fully advised in the premises, finds:

That in compliance with the Mandate of the Supreme Court of the State of Kansas, and the Mandate of the United States Supreme Court and its *per curiam* opinion, the judgment of this Court entered in this proceeding on the 14th day of May, 1956, be and the same should be vacated and set aside.

The Court further finds that the State Corporation Commission of the State of Kansas was without jurisdiction to enter its order in its Docket No. 44,079-C (C-3216) Conservation Division, dated December 2, 1953, same being the subject of review in this proceeding, and that said Order of said State Corporation Commission should be by this Court set aside, and that the costs of this proceeding should be taxed against the State Corporation Commission, defendant herein.

WHEREFORE, it is Considered, Ordered, Adjudged and Decreed by the Court:

1. That the judgment of this Court heretofore entered on the 14th day of May, 1956, in the above proceeding, be and the same is hereby vacated and set aside.

2. That the Order of the State Corporation Commission of the State of Kansas, entered December 2, 1953, in its Docket No. 44,079-C (C-3216), Conservation Division, be and the same is hereby set aside.

3. That the costs of this proceeding in the amount of $..... be and the same are hereby taxed against the State Corporation Commission of Kansas.

(Signed) ROLAND H. TATE
District Judge

/s/ CONRAD C. MOUNT
O. R. STITES
JOE ROLSTON
M. F. COSGROVE
MARK H. ADAMS
D. B. LANG

Attorneys for Plaintiff

APPROVED AS TO FORM:

s CLYDE MILLIGAN
FRANK G. THEIS
WAYNE COULSON

Attorneys for Defendants